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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 828

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A
CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners' statement is colored to a considerable extent by their biased viewpoint, but does contain sufficient facts that we do not deem it necessary to make a restatement of the case. Petitioners do, however, advance some new theories and arguments since the opinion of the United States Circuit Court of Appeals was written and which such opinion, therefore, does not deal with. In the hope that we may be of assistance to the court on such new theories and issues, we submit the following brief, relying entirely upon the opinion to refute all other arguments advanced.

The Judgment Entered upon a Trial of One Case Would Not Become Res Adjudicata and Relieve Respondent of a Trial of the Second Case Because Such Decision Could Be Appealed, and While the Same Was Pending on Appeal the Defense of Res Adjudicata Would Be Unavailable.

Petitioners contend that in no case could there be a multiplicity of suits because a judgment in one suit would become *res adjudicata* and constitute a defense to the second suit on the other policy. This contention is clearly fallacious. The defense of *res adjudicata* is available only where there is a final judgment; therefore, an appeal by either party from the judgment in the first case would suspend the judgment and render it unavailing as a defense under the doctrine of *res adjudicata,* since the same would not be a final judgment. In the case of *Bodkin* v. *Edwards,* 255 U. S. 221, 41 Sup. Ct. Rep. 268, this court said, l. c. 268:

> "Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under Section 128 of the Judicial Code (Comp. St. 1120)."

In the case of *Merriam* v. *Saalfield,* 36 Sup. Ct. Rep. 477; 241 U. S. 22, this court declared the law as follows, l. c. 28:

> "But it is familiar law that only a final judgment is *res adjudicata* as between the parties, and it is evident that a decree cannot be *res adjudicata* as against a third party participating in the defense unless it is so far final as to be *res adjudicata* against the defendant himself. Hence, if the decree of September 11th was not final as between appellant and Saalfield, it cannot be *res adjudicata* as

against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is found to be this: that, upon the theory that Ogilvie would be estopped from a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles."

Respondent's Petition on Its Face Shows There Is $4,500.00 Involved and the Court of Appeals So Found. The Fact the Record May Show a Defense Which Will Cut Down This Amount Below the Jurisdictional Amount Does Not Deprive the District Court of Jurisdiction.

Under Point "C" petitioners ingeniously argue that since respondent alleges the building is not worth more than $6,000.00, and since, as petitioners contend, though not sustained by the record, the policies in question contain a provision that in case other insurance was carried respondent would be liable only for its proportionate share, which in this case they charge would cut the liability on one policy to $1,200.00, leaving it, when added to the full amount of the other $1,500.00, at a total of only $2,700.00.

There are numerous answers to this contention. In the first place, the petition reveals that petitioners are demanding the full amount of their policies, or the full $4,500.00. The record reveals that petitioners had $15,000.00 in insurance on the real property involved. (Petitioners' Brief, page 24.) The record also shows that peti-

tioners are demanding full payment of the policy as a part of their scheme to obtain far in excess of the actual value of petitioners' building. (Petition, pages 3 and 4.) It is, therefore, apparent that the amount in dispute is the full value of these policies, or $4,500.00. The fact that on a trial respondent might be able to convince a jury that the property was not worth more than $6,000.00 and that respondent might be able to cut down their liability below the jurisdictional amount in case they are able to successfully establish the defense mentioned, to-wit: that of liability for only a proportionate part of the loss, dependent upon the proportion of respondent's coverage to the entire coverage. Such mere possibilities do not cut down the amount involved. In the case of *Schunk* v. *Moline, Milburn & Stoddard Company*, 13 Sup. Ct. Rep. 416, 147 U. S. 500, this court, in an opinion by Mr. Justice Brewer, declared the law as follows:

> "Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a nonnegotiable note for $2,500.00, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500.00; and, whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in

advance that that defense will be presented by the defendant, or, if presented, sustained by the court?"

The most favorable statement from petitioners' viewpoint, justifiable by the facts, is that there is some uncertainty as to the amount ultimately recovered being within the jurisdiction of the district court. This, of course, is insufficient for the rule is that the district court has jurisdiction unless it appears to a legal certainty that less than the jurisdictional amount is involved. In the case of *Wetmore* v. *Rymer*, 18 Sup. Ct. Rep. 295, 169 U. S. 115, this court stated the law as follows, l. c. 128:

> "Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant the dismissal of the action for the want of jurisdiction.
>
> The judgment of the circuit court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict."

Furthermore, at the time this action was instituted in the district court, petitioners had made a demand for the full sum of $4,500.00 which respondent had refused. Petitioners cannot now, by admitting they are entitled to less than the jurisdictional amount, deprive the district court of jurisdiction. In the case of *Re Metropolitan Railway Receivership*, 28 Sup. Ct. Rep. 219, 208 U. S.

90, this court stated the law in such a situation as follows, l. c. 107:

> "Although the amount involved in the suit in the circuit court was sufficient, it is insisted now that there was no dispute or controversy in that case within the meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers. Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of the debt due each of the complainants had been made and refused. This was not denied and has not been. There was, therefore, an unsatisfied demand made by complainants and refused by defendant at the time of the filing of the bill. We think that where there is a justiciable claim of some right made by a citizen of one state against a citizen of another state, involving an amount equal to the amount named in the statute, which claim is not satisfied by the party against whom it is made, it is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted, the federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the circuit court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt."

We submit the facts here do not demonstrate to a legal certainty that less than the jurisdictional amount is involved within the rulings, in the case of *Barry* v. *Edmunds*, 6 Sup. Ct. Rep. 501, 116 U. S. 550, where this court said, l. c. 559:

> "The order of the circuit court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said circuit court.'"

At pages 29 and 30 of petitioners' brief, they contend respondent's action is premature; that respondent should have waited until petitioners actually filed their suits and demonstrated the fact they were going to proceed in a way which would entitle respondent to maintain its action in the United States District Court. The fallaciousness of this contention is revealed at page 20 of petitioners' brief where they point out that the United States statutes prevent the District Court of the United States interfering in an action in the state court where the same

is already pending. In other words, they insist respondent should delay its action in the United States District Court until such action could not be maintained therein. By their inconsistency therein, petitioners demonstrate the fallacy of this contention.

The opinion of the United States Circuit Court of Appeals refutes all other arguments advanced by petitioners. It does not refute the arguments we have just answered for the reason such arguments were not made in that court until after the decision and are afterthoughts of petitioners' counsel, which this court should refuse to consider for that reason, as well as the other reasons advanced.

For all the reasons heretofore suggested herein, and the reasons stated in the opinion of the United States Circuit Court of Appeals, we respectfully ask that certiorari herein be denied.

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